In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1011

BURTZ-DURHAM CONSTRUCTION COMPANY, INC., AND CONTINENTAL CASUALTY COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a) is reported at 384 F. 2d 913. The opinion of the district court (Pet. App. 15a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1967. A timely petition for rehearing was denied on November 14, 1967. The petition for a writ of certiorari was filed on January 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

290-367—68——

QUESTION PRESENTED

Whether the court below properly held that a bid on a government contract could not be withdrawn after the bids had been opened.

REGULATION INVOLVED

The instructions to bidders attached to the Instructions to Bidders, known as Standard Form 22, 26 Fed. Reg. 1048 (February 3, 1961) (now 41 C.F.R. (Jan. 1, 1964 rev.) 1–16.901–22), provides in part:

> 4. *Bid Guarantee* * * *.
>
> * * * * *
>
> If the successful bidder withdraws his bid within the period specified therein for acceptance (sixty days if no period is specified) * * * he shall be liable for any difference by which the cost of procuring the work exceeds the amount of his bid, and the bid guarantee shall be available toward offsetting such difference.
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> * * * * *
>
> 7. *Late Bids and Modifications or Withdrawals.*
>
> Bids and modifications or withdrawals thereof received * * * after the exact time set for opening of bids will not be considered unless received before award and * * * (b) it is determined by the Government that late receipt was due solely to either (1) delay in the mails * * * for which the bidder was not responsible or (2) mishandling by the Government after receipt at the Government installation. * * *.
>
> 8. *Withdrawal of Bids.* Bids may be withdrawn by written or telegraphic request received from bidders prior to the time set for opening of bids.

STATEMENT

Petitioner Burtz-Durham Construction Company received an Invitation for Bids from the Army Corps of Engineers for the construction of a road and bridge. The invitation contained Instructions to Bidders, known as Standard Form 22, 26 Fed. Reg. 1048 (February 3, 1961),[1] which prohibited the withdrawal of a bid after the opening thereof except under conditions not relevant here. Burtz-Durham submitted a bid (along with a bid bond executed by petitioner Continental Casualty Company) in which the unit prices totaled $526,701.79.[2] This made Burtz-Durham the low bidder.

Burtz-Durham, after the opening of bids, claimed that its $526,000 bid contained a $38,000 error, and sought to withdraw the bid. Since satisfactory evidence of the alleged mistake was not presented to the contracting officer, he refused to allow withdrawal and awarded the contract to the company. Burtz-Durham refused to execute the contract documents; the government then re-let the contract and brought suit for the excess costs of $50,200 plus interest.

The district court, in awarding judgment to the government, found, *inter alia,* that the withdrawal could not be allowed since "Burtz-Durham failed to prove

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[1] Now found at 41 C.F.R. (Jan. 1, 1964 rev.) 1–16.901–22.

[2] The total as computed by Burtz-Durham was $1,129,201.79. This was the result of a clerical error which listed a figure of 670,100 in place of $67,010. In accordance with the provision in the bid that unit prices governed, the government corrected the erroneous total (Pet. App. 12a).

either by a preponderance of the evidence or by clear and convincing evidence" its alleged $38,000 error (Pet. App. 19a–20a). The court of appeals affirmed on the ground that the trial court's finding of "no mistake" was not clearly erroneous (Pet. App. 13a).

ARGUMENT

There is no merit to petitioners' contention that the government could not require that bids submitted on a government contract could not be withdrawn after the bids had been opened. It has long been recognized that such provisions with regard to government bids are entirely proper. See *Moffett, Hodgkins & Clarke Co.* v. *Rochester,* 178 U.S. 373; *W. A. Scott* v. *United States,* 44 Ct. Cls. 524. Nor was it improper for the trial court to hold that the determination of whether or not the bid submitted by Burtz-Durham was the result of a mistake should be governed by the standards set forth in the applicable government regulations. Cf. *Leslie Miller, Inc.* v. *Arkansas,* 352 U.S. 187; *Public Utilities Commission of California* v. *United States,* 355 U.S. 534. Finally, there is no reason for this Court to review the concurrent findings of the two courts below that there had been no mistake in this case. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635–636; *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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